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**IN THE
COURT OF APPEALS OF INDIANA**

IN RE THE MARRIAGE OF CHALICE KAY
FISHER n/k/a CHALICE KAY STRONG,

Appellant-Petitioner,

VS.

ERIC CAM FISHER,

Appellee-Respondent.

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No. 37A03-0609-CV-415

APPEAL FROM THE JASPER SUPERIOR COURT
The Honorable J. Philip McGraw, Judge
Cause No. 37D01-0102-DR-052

March 28, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

SHARPNACK, Judge

Chalice (Fisher) Strong (“Mother”) appeals the trial court’s modification of custody of her children to her former husband, Eric Fisher (“Father”). Mother raises three issues, which we consolidate and restate as whether the trial court abused its discretion by modifying custody. We affirm.¹

The relevant facts follow. Following the dissolution of their marriage in 2001, Mother was awarded physical custody of their two children, R.F., born August 21, 1997, and M.F., born January 18, 2000, but Father exercised a significant amount of parenting time each week. During the marriage, Father had been convicted of battery upon Mother. Both Mother and Father remarried after the dissolution of their marriage. Mother married Andrew Strong, and Father married Amanda Fisher.

Mother and Strong had incidents of domestic violence in June 2002 and June 2005. In September or October of 2005, Strong was arrested and charged with operating a vehicle while intoxicated and possession of marijuana. On November 22, 2005, Mother and Strong had an argument that resulted in a physical altercation in which Strong broke Mother’s arm. The children were in the residence during the altercation. As a result of the incident, Strong was arrested and charged with domestic battery. Strong then filed a petition for dissolution, and a protective order was issued against Strong. On November

¹ We remind Father that the statement of facts is to be a narrative statement of facts and is not to be argumentative. Parks v. Madison County, 783 N.E.2d 711, 717 (Ind. Ct. App. 2002), reh’g denied, trans. denied; see Ind. Appellate Rule 46(A)(6) & 46(B). Further, we remind both Mother and Father that facts should be supported by citations to pages in the transcript or the appendices. See Ind. Appellate Rule 22(C) & 46(A)(6)(a).

28, 2005, someone broke the windows out of Strong's vehicle and wrote "wife beater" on the vehicle. Emerg. Hearing Transcript at 14.

On December 2, 2005, Father filed a petition for an emergency change of custody and a petition for change of custody.² At a hearing on the petition for emergency change of custody, Father argued that an emergency change of custody was appropriate due to the domestic violence and instability between Mother and Strong. In opposition, Mother argued Strong was not living with her any longer and that dissolution proceedings had been filed. The trial court found no emergency, denied Father's petition for an emergency change of custody, appointed a guardian ad litem, and set the petition for change of custody for hearing.

In February 2006, Father filed a motion for a protective order to prevent Mother from removing the children from the jurisdiction. Mother filed a notice of intention to move to Indianapolis. At a hearing on the matter, Mother testified that she wanted to move to Indianapolis to be near her mother, who had purchased a home for her, and that she wanted to pursue a new career as a dental hygienist. The trial court granted the protective order and found that Mother "should be restrained from removing the children from the county or from their school until such time as the Court has heard and determined [Father's] Petition for Change of Custody." Protective Order Hearing Transcript at 41.

² Neither the appellant's appendix nor the appellee's appendix contains these documents.

At a hearing held in August 2006 on Father's petition for change of custody, Father presented evidence that Mother and Strong had reconciled in June 2006 despite the protective order in place and that Mother and Strong had just recently started counseling. The guardian ad litem, Todd Sammons, submitted a report and testified during the hearing. He testified that making a recommendation in this case was difficult because Strong and Mother had moved back in together. He concluded that there had been a significant change in circumstances due to a pattern of domestic violence in Mother's household. However, he could not "wholeheartedly find that an outright change of custody at this time is in the best interest of the children." Appellant's Appendix at 32. He recommended that Mother and Strong receive counseling, that the matter be continued for a "reasonable period of time to allow meaningful counseling to take place," and that the children temporarily spend more time with Father to allow Mother and Strong to "focus on their own issues." Id. at 32-33.

A family therapist, David Sexton, also gave a custody evaluation. He observed that the stepfamily relationships in this family were "toxic," that "[t]here is contempt, ridicule, competition and blame in abundance," and that "[t]he family is in need of treatment to provide education, guidance and support." Appellee's Appendix at 26. Sexton recommended that the children live primarily with Father for one year with Mother exercising parenting time on the same schedule that Father currently exercised, that Mother and Strong live apart pursuant to the protective order while participating in family therapy, and that Father and Amanda also consider family therapy.

After the hearing, the trial court entered the following findings of fact and conclusions thereon:

ORDER

The Court having taken the above-entitled matter under advisement, having reviewed all exhibits filed, the Guardian Ad Litem Report, the Custody Evaluator's report, and the testimony presented at the previous hearing, now finds as follows:

This matter commenced with the filing of a Verified Motion for Emergency Change of Custody by the former Husband, Eric Fisher, on December 2, 2005. Thereafter the Court held a hearing on December 22, 2005, and found from the testimony presented that at that time no emergency existed for the following reasons:

1. The former Wife's current Husband, Andrew Strong, had been removed from their marital residence and was no longer a threat of violence to either the former Wife, Chalice Strong, or the minor children, [R.F.] and [M.F.].
2. The former Wife's mother, Sandy Roberts, was assisting Chalice Strong so that she would be able to care for the minor children, even though she had a broken arm caused by her current husband, Andrew Strong, during a domestic dispute.
3. There was no evidence as to who caused damage to Andrew Strong's motor vehicle located on her property, although it was inferred that the damage to her current husband's vehicle might have been committed by Chalice Strong's brother.
4. At that hearing, Chalice Strong assured the Court that
 - A. Her current Husband, Andrew Strong, had been removed from their marital dwelling;
 - B. Andrew Strong was not going to be residing in their marital dwelling;
 - C. Chalice Strong had filed a dissolution of marriage action against Andrew Strong;
 - D. Chalice Strong was moving to Indianapolis to a new home that her mother had purchased for her; and

E. Chalice Strong was pursuing a career as a dental hygienist.

Based on these facts, the Court denied the former Husband's Motion for Emergency Change of Custody as the emergency no longer existed. The Court further set this cause for hearing on the former Husband's Verified Motion for Change of Custody, appointed a Guardian Ad Litem for the minor children, and ordered the parties to complete child custody counseling.

The Court finds from the testimony of the Guardian Ad Litem and the report heretofore filed that it is the Guardian Ad Litem's recommendation that the status quo be maintained in that there has been no substantial change in circumstances and that it is not in the best interest to warrant the granting a change of custody at this time.

The Court finds that the Guardian Ad Litem's recommendation is in conflict with the custody evaluator's recommendation, who feels that Chalice Strong is currently making bad parenting decisions for the following reasons:

1. Chalice Strong has allowed Andrew Strong to move back in their marital dwelling and remain in their marital home;
2. Chalice Strong and Andrew Strong have not established, until shortly before the hearing, any counseling as to their marriage and anger management issues.
3. Andrew Strong is still consuming alcoholic beverages and marijuana, although Chalice Strong testified that it was not done in the presence of the minor children, [R.F.] and [M.F.].

The Court further finds as follows:

1. Chalice Strong is not pursuing any additional education and is not fully employed at this time.
2. The former Husband, Eric Fisher, is full-time self-employed, owning his own business and setting his own schedules as an independent contractor.
3. The former Husband, Eric Fisher, has remarried; owns a home that has been shown to be suitable for the care and custody of the minor children, [R.F.] and [M.F.], and a child of his current Wife who resides with them.

The Court having reviewed all of the facts and evidence presented now finds that it is in the best interest of the children to grant the Former Husband's Verified Petition for Change of Custody in that the reasons that were previously set forth in the emergency petition now are existing within the former Wife's home, plus the fact that there is undisputed evidence of illegal drug use by one of the adults residing in that household. Based on these facts, the Court finds that there has been a substantial change in circumstances since the emergency (prior) hearing and Chalice Strong has re-created the same situation that existed before the filing of the Verified Petition for Emergency Change of Custody.

Based on the finding by the Court, the former Husband, Eric Fisher, is now granted physical custody of the minor children, [R.F.] and [M.F.]. The custody exchange shall be effective immediately, with the same being completed within twenty-four (24) hours from this Order being entered.

The former Wife, Chalice Strong, shall be granted, at a minimum, guideline visitation pursuant to the Indiana Parenting Time Guidelines. The Court encourages that the visitation schedule previously exercised by the former Husband, Eric Fisher, be granted to the former Wife, Chalice Strong. Alternating weekend visitation shall commence August 25, 2006, at 6:00 p.m.

Further, the Court directs that both parties submit complete financial declaration forms for the determination of child support to be paid by the former Wife, Chalice Strong, to the former Husband, Eric Fisher. Said Financial declaration forms are to be filed with this Court within fourteen (14) days from the date of this Order.

Appellant's Appendix at 7-11.

The issue on appeal is whether the trial court abused its discretion by modifying custody. We review custody modifications for an abuse of discretion and have a "preference for granting latitude and deference to our trial judges in family law matters." Kirk v. Kirk, 770 N.E.2d 304, 307 (Ind. 2002). "We set aside judgments only when they are clearly erroneous, and will not substitute our own judgment if any evidence or

legitimate inferences support the trial court's judgment." Id. The Indiana Supreme Court explained the reason for this deference in Kirk:

While we are not able to say the trial judge could not have found otherwise than he did upon the evidence introduced below, this Court as a court of review has heretofore held by a long line of decisions that we are in a poor position to look at a cold transcript of the record, and conclude that the trial judge, who saw the witnesses, observed their demeanor, and scrutinized their testimony as it came from the witness stand, did not properly understand the significance of the evidence, or that he should have found its preponderance or the inferences therefrom to be different from what he did.

Id. (quoting Brickley v. Brickley, 247 Ind. 201, 204, 210 N.E.2d 850, 852 (1965)).

Therefore, "[o]n appeal it is not enough that the evidence might support some other conclusion, but it must positively require the conclusion contended for by appellant before there is a basis for reversal." Id. We may neither reweigh the evidence nor judge the credibility of the witnesses. Fields v. Fields, 749 N.E.2d 100, 108 (Ind. Ct. App. 2001), trans. denied.

The child custody modification statute provides, in part, that "[t]he court may not modify a child custody order unless: (1) the modification is in the best interests of the child; and (2) there is a substantial change in one (1) or more of the factors that the court may consider under [Ind. Code § 31-17-2-8]" Ind. Code § 31-17-2-21(a). Ind. Code § 31-17-2-8 lists the following factors:

- (1) The age and sex of the child.
- (2) The wishes of the child's parent or parents.
- (3) The wishes of the child, with more consideration given to the child's wishes if the child is at least fourteen (14) years of age.
- (4) The interaction and interrelationship of the child with:
 - (A) the child's parent or parents;
 - (B) the child's sibling; and

- (C) any other person who may significantly affect the child's best interests.
- (5) The child's adjustment to the child's:
 - (A) home;
 - (B) school; and
 - (C) community.
- (6) The mental and physical health of all individuals involved.
- (7) Evidence of a pattern of domestic or family violence by either parent.
- (8) Evidence that the child has been cared for by a de facto custodian, and if the evidence is sufficient, the court shall consider the factors described in section 8.5(b) of this chapter.

Thus, to modify custody of the children, the trial court must have found that modification was in their best interest and that a substantial change in one of the factors had occurred.

Mother contends that the trial court ignored evidence supporting the denial of a change of custody, such as Father's testimony that Strong was not violent or aggressive, the guardian ad litem's testimony and report, the custody evaluator's testimony and report which recommended a one-year change of custody, and Father's alcohol-related convictions and battery conviction. This argument is merely a request that we reweigh the evidence and judge the credibility of the witnesses, which we cannot do. Fields, 749 N.E.2d at 108.

Mother also argues that the trial court's modification is erroneous because no substantial change occurred. To the contrary, it is clear from the trial court's order that it found a substantial change due to Mother's relationship with Strong, the domestic violence between Mother and Strong, and illegal drug use by Strong. The evidence revealed a pattern of domestic violence between Mother and Strong, which resulted in Strong breaking Mother's arm. Even the guardian ad litem, who did not recommend a

change of custody at this time, found a substantial change in circumstances due to the pattern of domestic violence in Mother's household. Additionally, Strong had been arrested for operating a vehicle while intoxicated and possession of marijuana. Mother informed the guardian ad litem that "[s]he was aware that [Strong] had smoked marijuana in the past but indicated he never did it in the house and never around any of the children." Appellant's Appendix at 25. Although Mother and Strong had separated and filed for dissolution at the time of the emergency custody hearing, at the time of the permanent custody hearing, the couple had resumed living together in violation of a protective order. Despite the history of domestic violence, Mother and Strong informed the guardian ad litem and custody evaluator that they did not believe counseling was necessary and, at the time of the hearing, had engaged in only limited counseling.

Under these circumstances, we cannot say that the trial court erred by finding a substantial change due to the domestic violence and Mother's relationship with Strong or by finding that a change of custody was in the best interest of the children. See, e.g., Bowman v. Bowman, 686 N.E.2d 921, 927 (Ind. Ct. App. 1997) (holding that the trial court did not abuse its discretion when it used the mother's spanking of one of the children which led to the charge of battery against the mother and the filing of a CHINS petition, the boys' relationship with their mother and their stepsister, mother's decision to home school the boys, mother's subsequent marriage, and mother's use of inappropriate caretakers for the boys to support its conclusion that there was a substantial change in the applicable statutory factors).

Finally, Mother argues that the trial court abused its discretion by giving her the minimum parenting time. In all parenting time controversies, courts are required to give foremost consideration to the best interests of the child. In re Paternity of G.R.G., 829 N.E.2d 114, 122 (Ind. Ct. App. 2005). When reviewing the trial court's resolution of a parenting time issue, we reverse only when the trial court abused its discretion. Id. If the record reveals a rational basis for the trial court's determination, there is no abuse of discretion. Id. We will not reweigh evidence or reassess the credibility of witnesses. Id.

The trial court found: "[Mother] shall be granted, at a minimum, guideline visitation pursuant to the Indiana Parenting Time Guidelines. The Court encourages that the visitation schedule previously exercised by [Father] be granted to [Mother]. Alternating weekend visitation shall commence August 25, 2006, at 6:00 p.m." Appellant's Appendix at 11. Mother contends that "[a] reasonable person would conclude that the Father is only going to allow the Mother to have minimal guideline visitation." Appellant's Brief at 11. However, we have no evidence in the record that Father is allowing Mother only the minimum parenting time recommended under the Parenting Time Guidelines. Moreover, given the evidence of instability and domestic violence in Mother's household that was presented during the custody hearing, we cannot say that the parenting time ordered by the trial court was an abuse of discretion. See, e.g., G.R.G., 829 N.E.2d at 123 (holding that the visitation schedule ordered by the trial court was not an abuse of discretion).

For the foregoing reasons, we affirm the trial court's modification of custody.

Affirmed.

BAILEY, J. and MAY, J. concur